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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 729

HARRY L. COE,
Petitioner,

vs.

HELMERICH & PAYNE, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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IN THE

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No. _____

HARRY L. COE,
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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Tenth Circuit:

Harry L. Coe, petitioner, prays that a writ of certiorari issue to review the judgment entered in this cause on August 17, 1964, by the United States Court of Appeals for the Tenth Circuit affirming the granting of summary judgment for respondent under Rule 56 of the Federal Rules of Civil Procedure by the United States District Court for the District of Kansas.

OPINIONS BELOW

The Memorandum of Decision of the United States District Court for the District of Kansas, dated March 1, 1962 (Appendix A); the Memorandum of Decision of the United States District Court for the District of Kansas, dated August 30, 1963 (Appendix B); the opinion of the United States Court of Appeals for the Tenth Circuit, 348 F.2d 1 (Appendix C); the opinion of the Supreme Court of the State of Kansas in *Hataway* v. *Procter & Gamble Manufacturing Company,* No. 44,047, filed August 17, 1965 (Appendix D); the Motion for a Rehearing filed by appellee in the *Hataway* case (Appendix E).

JURISDICTION

The United States Court of Appeals for the Tenth Circuit affirmed the granting of summary judgment by the United States District Court for the District of Kansas on August 17, 1964. A petition for a rehearing was filed in the Court of Appeals on September 2, 1964, and was denied on August 27, 1965.

On October 8, 1965, the mandate was stayed for a period of 30 days as provided by Rule 28(3) of said court.

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTION PRESENTED

1. May a federal appellate court sitting in review in a diversity case rely on the judgment of a local district court judge as to the interpretation of local law where there is an intervening decision by the highest state court which changes the law of the state or clarifies it significantly, and where the local district judge did not have the benefits of such latest decision?

STATUTES INVOLVED

28 U.S.C. § 1652. *State laws as rules of decision.*

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Kan. Stat. Ann. 44-503. *Subcontracting.*

(a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of his trade or business or which he has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then in the application of this act references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed.

* * *

(d) This section shall not apply to any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken to execute work or which are otherwise under his control or management, or on, in or about the execution of such work under his control or management.

STATEMENT

This application for review arises out of a bizarre sequence of events following the petitioner's filing of his complaint in the United States District Court for the District of Kansas seeking to recover for horribly crippling injuries suffered as the result of an oil tank explosion. As will sometimes occur in the administration of the law, five years have elpased since this unfortunate occurrence and not only has the cause not been heard on its merits, but the petitioner is confronted with the possibility that it will never be heard on its merits.

On October 21, 1960, petitioner was employed by one Donald W. Edwards as a truck driver and laborer. Edwards was engaged in the business of a common carrier of crude oil and water, as well as a so-called accessory service of cleaning oil storage tanks in and about Garden City in western Kansas. He was licensed to engage in such business by the Corporation Commission of the State of Kansas. The respondent is an Oklahoma corporation engaged in activities related to the oil and gas business. One of these activities, the production of oil and gas, was undertaken on a lease known as U.S.A. 4 on the Pleasant Prairie Pool, near Garden City, Kansas. Crude oil is pumped out of the ground and collected and stored in oil storage tanks prior to its sale to a pipe line company. The oil so stored contains sediment which constantly settles, thus requiring periodic cleaning of the bottom of the tanks.

Edwards was first engaged to clean tanks by respondent on June 7, 1958. He also contracted to haul water and oil for drilling purposes. He did such work under an oral agreement which provided for the standard rate of pay for the labor and equipment. The rate was set by the Kansas Corporation Commission. He was not engaged to

clean tanks for respondent on a regularly scheduled basis, but only when called by it. By discovery, it was established that none of respondent's employees ever assisted Edwards or any other tank cleaning firm in the cleaning of its tanks either prior, or subsequent, to October 21, 1960, the date of the explosion. Two other tank cleaning firms were also used by respondent to clean its tanks.

David Dietz, respondent's lease pumper at the Pleasant Prairie Pool, testified that he had been on the lease for three years and that during that time respondent had always hired someone else to do the cleaning. He further testified that respondent kept no crew for this purpose. Petitioner testified by deposition that it is customary for the oil producers in that area to hire somebody else other than their own employees to clean tanks. That was the general custom followed in that particular oil field. The affidavits of Edwards, Virgil Lathem, and A. T. Walker, all common carriers of crude oil and fresh water, as well as tank cleaners operating in the Garden City area, stated that the type of work involved in petitioner's case was normally not performed by employees of the producers. The trial court found that it was customary for the respondent to hire out the tank cleaning work. (Appendix B, p. A5)

On October 21, 1960, oil storage tank 246, owned and operated by respondent, exploded when petitioner, in his capacity as an employee of Edwards, was preparing to clean it. As a result, he suffered severe, disabling, and disfiguring second and third degree burns over the greater part of his body resulting in extensive hospitalization, 22 separate plastic surgery procedures, and total and permanent disability.

On February 14, 1961, the petitioner filed his complaint in the United States District Court for the District

of Kansas alleging that as a result of the failure of respondent to use due care in the installation, service, and maintenance of tank 246, said tank exploded, damaging the petitioner in the amount of $250,000.00. Jurisdiction was based on diversity of citizenship. On July 18, 1962, after discovery had been begun, a motion for summary judgment was filed by the respondent. While the motion was pending, the Supreme Court of the State of Kansas handed down a decision which appeared conclusively favorable to petitioner and perhaps even overruled cases which would have otherwise cast some doubt on the strength of petitioner's case. *Henderson* v. *Sutton's Food City,* 191 Kan. 145, 379 P.2d 300 (1962). The motion for summary judgment in the federal court was sustained by the Honorable Arthur J. Stanley, Jr., on August 30, 1963. The court concluded that this petitioner was a statutory employee within the meaning of Kan. Stat. Ann. 44-503 and therefore precluded from bringing a third party action. He was thus limited to the recovery provided by the Kansas workmen's compensation act.

The opinion distinguished *Henderson,* finding it inapplicable on the ground that the accident there occurred *off* the premises of the third party, whereas this petitioner was injured *on* the premises. Additionally, the court noted that "The depositions taken and interrogatories answered sufficiently show that the work in which the plaintiff was engaged was clearly a necessary incident to the defendant's trade" (App. B, p. A7); thus relying on *Lessley* v. *Kansas Power and Light,* 171 Kan. 197, 231 P. 2d 239 (1951). Appeal was taken to the United States Court of Appeals for the Tenth Circuit, but on August 17, 1964, the judgment of the lower court was affirmed. *Coe* v. *Helmerich & Payne, Inc.,* 348 F.2d 1. The Court of Appeals explained that it could find no consistent pat-

tern in the Kansas decisions and chose to bottom its own decision on the lower court's interpretation of local law.

Concurrently, however, a curious set of circumstances was developing. Counsel for this petitioner was also counsel for another plaintiff in a workmen's compensation-third-party suit pending in the state district court of Wyandotte County, Kansas (*Hataway* v. *Procter & Gamble, Inc.*, District Court of Wyandotte County, Kansas, No. 15,949-B). *Hataway* involved an *on-the-premises* accident analogous to the accident involved herein. On May 22, 1964, a motion for summary judgment was granted against the plaintiff in the *Hataway* case and an appeal taken to the Kansas Supreme Court. On September 2, 1964, after the decision of the Tenth Circuit had been announced, but before the argument to, or the decision of, the Kansas Supreme Court in *Hataway*, a petition was filed with the Court of Appeals asking for a rehearing, or in the alternative that the court stay its final decision pending the decision of the Supreme Court of the State of Kansas in *Hataway*. The latter was granted and the Court of Appeals stayed proceedings.

The third party question arose in exactly the same manner in *Hataway* as in the case at bar. The statutory employee defense was again raised, that is, that plaintiff Hataway, a foreman for a construction company erecting a building for Procter & Gamble, was by virtue of Kan. Stat. Ann. 44-503 also the employee of Procter & Gamble, so that his remedy was restricted to the limited benefits of the Kansas workmen's compensation law. On the appeal to the Kansas Supreme Court, it became evident that the state case and the instant federal case had assumed precisely identical postures on an extremely important point of local law. The only question before the two courts was whose work was being done? That answer would resolve

the on or off the premises thesis which the lower federal court had considered conclusive, but which because of the statute cited, and the case law, was really of no significance. It yielded to the "whose work was being done" question.

If the two defendants were correct, the erection of a building and the cleaning of oil tanks were activities necessary for them to continue and function in their respective businesses. Therefore, it was their work which was being done so that the respective plaintiffs became their statutory employees under the appropriate Kansas statutes and thus barred from common law relief against them.

The plaintiffs, however, contended that they were engaged in work not regularly done by employees of the defendant, and therefore, under the latest Kansas decision, they were not statutory employees and thus free to pursue their common law actions against the defendants.

Counsel for this respondent obtained leave in the state case to appear as *amicus curiae*. They filed an extensive brief adopting *the identical arguments they had urged before the Court of Appeals*. In his brief filed in the state case, the appellant there pointed out the confusion expressed by the Court of Appeals and urged that the situation be clarified. This case then pended in the Court of Appeals awaiting the outcome of *Hataway* before the state court. Oral argument was had, and *Hataway* was decided on August 17, 1965. The Kansas Supreme Court reversed the ruling of the state trial court which had granted summary judgment to the third party and concluded that *Hataway was not restricted* to the benefits of the Kansas workmen's compensation act but could bring an action in tort against the third party.

Since it appeared clear that the Kansas Supreme Court had finally clarified the earlier decisions, and that the *Hataway* case was directly in point with the case at bar, counsel then apprised the Circuit Court of Appeals of the decision. The surprising result was, however, that on August 27, 1965, without argument or other presentation of views as to the applicability of *Hataway*, the petition for rehearing was denied without opinion. The Court of Appeals thus apparently relied on its opinion prepared one year earlier which in turn had relied on the judgment of the local federal judge in 1963. And this was done notwithstanding the fact that the *Hataway* decision which was not available to the trial judge did materially change and clarify the Kansas case law interpretation with regard to the right to recover against the third party of an *on-the-premises* accident, and with regard to the "whose work is being done" doctrine. All this, even though the Circuit Court of Appeals had withheld its ruling on petitioner's motion for a rehearing for more than a year waiting the outcome of the Kansas case.

In *Hataway* a petition for rehearing was filed on September 1, 1965, and denied on September 10, 1965. A copy of this petition for rehearing which reiterated all the arguments of the respondent herein which apparently had persuaded the Court of Appeals, but not the Kansas Supreme Court, is appended hereto.

It is clear that the Court of Appeals has ignored the efforts of the Kansas Supreme Court to clarify earlier decisions and to inject consistency in this field of Kansas law.

REASONS FOR GRANTING THE WRIT

I

The Appellate Court Ignored Its Obligation to Follow Local Law When It Neglected to Consider the Effect of a Change of Local Law Occurring After the Decision of the Trial Court and Before the Final Decision of the Appellate Court.

The manner in which the appellate court disposed of this petitioner's appeal was squarely contrary to the rulings of this Court as well as the Rules of Decision statute, 28 U.S.C. § 1652. In *Huddleston* v. *Dwyer*, 322 U.S. 232, 64 S.Ct. 1015, 88 L.ed. 1246, this Court said:

> "State law is the controlling rule of decision in this case as to both substantive and procedural rights of the parties. Erie R. Co. v. Tompkins, 304 U.S. 54, 82 L.ed. 1188, 58 S.Ct. 817, 114 A.L.R. 1487, Federal Rules of Civil Procedure, Rules 69(a), 81(b), 28 U.S.C.A. following § 723(c), 8 F.C.A. 1937 ed. title 28, Appx. 3, pp. 741, 747. It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls decision. Meredith v. Winter Haven, 320 U.S. 288, 88 L.ed. 9, 64 S.Ct. 7. And a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones. 'Until such time as the case is no longer sub judice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.' Vanderbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543, 85 L.ed. 327, 330, 61 S.Ct. 347.

The second opinion of the Oklahoma Supreme Court in the Wilson case has at least raised such doubt

as to the applicable Oklahoma law as to require its re-examination in the light of that opinion and of later decisions of the Supreme Court of Oklahoma on which respondents rely, before pronouncement of a final judgment in the case by the federal courts." l.c. 236-237, 88 L.ed. at 1249.

The case at bar is a diversity case, brought in the United States District Court for the District of Kansas, by a Kansas resident against an Oklahoma citizen to recover for a tort committed in Kansas on the former by the latter. As such it is controlled by *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.ed. 1188, and those principles subsequently developed therefrom by this Court. Those relevant and controlling principles, so developed, which are applicable to this petitioner's cause are succinctly set out in the quotation above from *Huddleston* v. *Dwyer, supra.* It would serve no useful purpose to once again demonstrate that the rules there delineated are sound in theory and just in result. It is sufficient for present purposes to notice that this Court continues to adhere to them. *Erie* still obtains. *Commissioner of Internal Revenue* v. *Stern*, 357 U.S. 39, 2 L.ed. 1126, 78 S.Ct. 1047. As recently as *Linkletter* v. *Walker*, 381 U.S. 618, 85 S.Ct. ....., 14 L.ed. 2d 601, this Court explained again, quoting Chief Justice Marshall in *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 2 L.ed. 49:

> " 'It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the judgment of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.' "

* * *

> "This same approach was subsequently applied in instances where a statutory change intervened, Carpenter v. Wabash R. Co., 309 U.S. 23, 84 L.ed. 558, 60 S.Ct. 416 (1940); where a constitutional amendment was adopted, United States v. Chambers, 291 U.S. 217, 78 L.ed. 763, 54 S.Ct. 434, 89 A.L.R. 1510 (1934); and where judicial decision altered or overruled earlier case law, Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 85 L.ed. 327, 61 S.Ct. 347 (1941)." 14 L.ed. at 606-607.

It remains now, to show that the opinion of the Kansas Supreme Court in *Hataway* at least raised such doubt as to the applicable Kansas law as to require its examination before pronouncement of a final judgment in this case by the federal courts. When this has been done, the Circuit Court's disregard of the *Huddleston* mandate, through its failure to consider the applicability of the *Hataway* decision, will be clear.

II

The Decision of the Kansas Supreme Court in Hataway v. Procter & Gamble, Inc., Changed or Clarified the Applicable State Law Subsequent to the Local Court Decision and Prior to the Appellate Decision Thereby Requiring Re-Examination of the Ruling of the Lower Court.

The attitude with which a federal appellate court must approach an intervening change in local law was described in the earlier quotation from *Huddleston*:

> "The second opinion of the Oklahoma Supreme Court in the Wilson case has at least *raised such doubt* as to the applicable Oklahoma law as to require its re-examination in light of that opinion * * *, before pronouncement of a final judgment in the case by the federal courts." (l.c. 322 U.S. at 236-237) (Emphasis supplied).

Your petitioner respectfully submits that the change introduced into Kansas case law by *Hataway*, at the minimum, raised such doubt as to the applicable Kansas law as to require re-examination of the trial court's decision in light of it.

As is generally true, in Kansas,

> "* * * If a workman can recover compensation under the workmen's compensation act (G.S. 1935, Ch. 44, Art. 5) for an injury the remedy is exclusive and he cannot maintain a common law action for damages founded on negligence against a party from whom he could have recovered compensation under the act." *Lessley* v. *Kansas Power & Light*, 171 Kan. 197, 203, 231 P.2d 239, 244 (1951).

Those workmen entitled to recover compensation under the Kansas act are described in Kan. Stat. Ann. 44-503. Whether or not the petitioner has a cause of action against the respondent for the latter's alleged negligence depends on the meaning of that statute's crucial language:

> "* * * undertakes to execute any work which is a part of his trade or business * * *."

There is no statutory definition of this language, and consequently recourse must be had to case law. The Kansas case law definition of this statutory language has recently undergone change; and it is the substance and timing of the change which is the very heart of petitioner's position.

The earlier Kansas view was laid out in *Lessley* v. *Kansas Power & Light Company, supra.* In that case plaintiff was employed by a subcontractor of the general contractor to assist in the building of a power plant for the defendant. While on the job plaintiff was injured by an explosion in the building in which he was working. He thereupon brought a common law action against the de-

fendant power company to recover damages for the personal injuries suffered by him. The trial court sustained defendant's motion for judgment on the pleadings on the ground that the plaintiff was entitled to workmen's compensation benefits from the defendant and therefore not entitled also to pursue his common law remedy for damages. The plaintiff appealed, but the decision of the trial court was affirmed. The Kansas Supreme Court noted:

> "At the time defendant entered into the contract just mentioned, and at all times pertinent to the issues involved, it did not have in its regular employ persons skilled and experienced and regularly engaged in the construction of large buildings and the installation of large and heavy equipment therein." (l.c. 200, 231 P.2d at 242).

Defining the issue which was raised on appeal, the court said:

> "In the final analysis the acid test to be applied is whether the work contracted to be done was a part of the appellee's trade or business." (l.c. 206, 231 P.2d at 246-247).

One of the issues raised by the plaintiff on appeal was that appellant and appellee were not subject to the workmen's compensation act if the work undertaken by appellee and so contracted was not usually and ordinarily performed in the operation of its trade or business. To this, the court responded:

> "The answer to its third argument has already been indicated. Shortly stated, it is that liability under Section 44-503 is not limited to work usually or normally performed by the principal but extends to all work which is a part of its trade or business." (l.c. 209, 231 P.2d at 248).

The court had earlier concluded that new buildings and new equipment were incidents essential to the proper maintenance of such a business, and thus denied recovery.

But the *Lessley* case is not Kansas' latest interpretation of the crucial language. From this point on it is necessary to keep in mind this question: Whether the cases since *Lessley* raise such a doubt as to the applicable Kansas law as to require its examination in light of them.

Twelve years after *Lessley* came *Henderson* v. *Sutton's Food City, Inc.*, 191 Kan. 145, 379 P.2d 300 (1963). Henderson was an employee of a trash hauler who had contracted with defendant, a grocery store, to remove trash from its premises. While en route to defendant's place of business, Henderson had an accident, and, attempting compliance with the ruling of the *Lessley* case, brought a claim for *workmen's compensation benefits* against the respondent Sutton. But benefits were denied on the ground that Henderson was *not* a statutory employee of the respondent as contemplated by the provisions of G.S. 1949, 44-503(a), and the district court's decision was affirmed on appeal. Whether or not Henderson was such an employee was the question raised.

The opinion does not mention *Lessley* but relies largely on *Durnil* v. *Grant*, 187 Kan. 327, 356 P.2d 872 (1960), saying:

> "In *Durnil* v. *Grant*, supra, it was said: 'The applicability of the statutory employee section, 44-503 (*a*), supra, in this jurisdiction has been determined in many decisions by inquiring whether the work involved would ordinarily have been done through employees of the principal. Thus, in Larson on Workmen's Compensation, Vol. 1, § 49.12, it is stated:
>
> > " " '. . . But, with a surprising degree of harmony, the cases . . . agree upon the general rule-of-thumb that

> the statute covers all situations in which work is accomplished which this employer, or employers in a similar business, would ordinarily do through employees'." (p. 725) (p. 334).
>
> "Insofar as the record discloses hauling trash is not work which the manager of a grocery super market would ordinarily have done through employees of the business.
>
> "Here Sutton exercised no direction, supervision or control over the claimant or his employer, or over the manner in which Miller carried on his trash hauling business. * * *
>
> "We think it is immaterial to a decision herein that on the day of the accident here in question claimant's only trash haul was to be from the Sutton Store. The business of Miller was that of hauling trash. There were approximately twenty or more business establishments under trash hauling contracts with Miller, who was claimant's employer. * * *
>
> "The claimant was not actually performing the work of Sutton, but was performing the work of Miller, an independent businessman with twenty or more different trash hauling stops. * * *" (l.c. 148-49, 379 P.2d at 303).

The apparently controlling *Lessley* case was never discussed, even though it would seem patent that for a super market the hauling away of trash would come within the limits of *Lessley's* "all work which is a part of its trade or business", and surely is an incident essential to the proper maintenance of such a business.

Henderson was brought to the attention of the local court and the Court of Appeals, but the lower court distinguished the decision on the ground that the accident there occurred *off* the premises while the accident in the case at bar had occurred *on* the premises. That distinc-

tion was shortly destroyed in *Hataway* v. *Procter & Gamble, Inc.*, No. 44,047, opinion filed August 17, 1965.

Factually, *Hataway* distinctly resembles *Lessley*. Hataway was employed by a subcontractor of the defendant who was in the process of building, on the defendant's premises, an addition to the defendant's plant. While carrying out the duties of such employment, he was injured as a result of the negligence of the defendant. The plaintiff relied on the apparent meaning of the *Henderson* decision, and brought a common law action for damages, rather than a workmen's compensation claim, against Procter and Gamble. The trial court decided to rely on *Lessley*, rather than *Henderson*, and granted summary judgment against the plaintiff. On appeal, this decision was reversed.

As a basis for the reversal, the Kansas Supreme Court, just as the plaintiff, relied on *Henderson*, and repeated the following language from that case:

> " 'Insofar as the record discloses hauling trash is not work which the manager of a grocery super market would ordinarily have done through employees of the business. (p. 148)
>
> "In the Henderson case we found that the classification of a trash hauler was a separate and independent business operation."

The *Hataway* opinion, at page 10, concluded:

> "We are convinced that in view of what has been stated and discussed, that the Henderson case was controlling here. Insofar as the record discloses, the construction of the Tide Building was not work which the manager of Procter and Gamble Soap Company would ordinarily have done through employees of the business of manufacturing soaps and detergents. It was Fruin-Colnon Contracting Company's business to

> construct the building for the Tide addition on the Procter and Gamble plant and it was the latter's business to operate the Tide addition after its erection."

Certainly the addition to a soap plant (*Hataway*) is just as much a part of the "work which is a part of its trade or business" for that soap plant as is an addition to a power plant (*Lessley*). And clearly the addition to a soap plant is an incident just as essential to the proper maintenance of such a business as is the addition to a power plant. But the *Hataway* decision did not rely on these applications of the crucial language, even though they were squarely applicable. The *Hataway* decision, instead, pointed out that the record disclosed that construction work was not the work which Procter and Gamble's manager would ordinarily have done through employees under his control. And the record in the present case discloses, *at a minimum,* that there is a clear question of fact whether the cleaning of sediment from the bottom of storage tanks was work that the defendants or others in the same business, would ordinarily have done through employees under their control.

The affidavits and depositions clearly established in this case that the involved work was not performed by employees of respondent.

Referring specifically to *Lessley,* the Kansas court said:

> "It should be noted that in the admitted facts in the pleadings of the Lessley case, we find in regard to the Kansas Power & Light Company that, 'It was authorized to do business as a public utility and . . . by virtue of the articles of incorporation issued it by the State of Kansas it was authorized . . . to do all things necessary for the conduct of a general electric . . . business, also to *build, construct* . . . power plants, power houses . . .'." (Emphasis by court) (p. 199, 251 P.2d at 242).

While neither *Henderson* nor *Hataway* expressly overrule *Lessley*, their repudiation of it is clear. At the very *minimum*, they raise such a doubt as to its applicability to the present case as to require the appellate court to re-examine its application of *Lessley* before the pronouncement of a final judgment by the federal court. To deny this re-examination is to deny the obligation of local law.

CONCLUSION

This Court is not called upon to find that *Henderson* and *Hataway* have overruled *Lessley*, but only that they have raised such doubt as to its applicability in the present case as to require a re-examination of its application in light of those two cases before the federal courts pronounce final judgment. The petitioner believes such doubt is clearly shown, and that re-examination is required. When the Circuit Court failed to re-examine, it acted in conflict with all other circuits, potentially in conflict with state law, and clearly in conflict with the decisions of this Court.

It is respectfully urged that for the reasons given, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

HARRY L. COE,
Plaintiff,
vs.
HELMERICH & PAYNE, INC.,
Defendant.
No. KC-1511

Memorandum of Decision

(Filed March 1, 1962)

This is an action seeking recovery for common law negligence. The defendant is engaged in the business of developing oil and gas leases, conducting drilling and pumping operations, and storing and selling crude oil. Plaintiff is a truck driver and laborer employed by Donald W. Edwards. Edwards operates trucks to haul water to drilling sites and also cleans crude oil storage tanks. Defendant contracted with Edwards to clean a tank. Plaintiff was injured while attempting to remove an "access plate" on the tank. Defendant's motion to dismiss for failure to state a claim upon which relief can be granted, is now before this court.

Defendant contends that plaintiff is restricted to recovery of workmen's compensation as an exclusive remedy. Defendant would bring plaintiff within the Kansas Workmen's Compensation Act under § 44-503(a):

> "Where any person (in this section referred to as principal) undertakes to execute any work which is a part of his trade or business or which he has contracted to perform and contracts with any other per-

son (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this act which he would have been liable to pay if that workman had been immediately employed by him. * * *"

The action should not be dismissed for failure to state a claim unless the complaint shows conclusively that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. 2 Moore, Federal Practice 2245 (2d ed. 1948). Before resolving that question, the rule which will govern the answer must be ascertained.

The Kansas rule is "that if a workman can recover compensation under the workmen's compensation act for an injury the remedy is exclusive and he cannot maintain a common law action for damages founded on negligence against a party from whom he could have recovered compensation under the act." *Lessley* v. *Kansas Power & Light Co.*, 171 Kan. 197, 231 P.2d 239 (1951).

The earlier Kansas cases excluded employees of independent contractors from coverage under G.S. 44-503. The case of *Bittle* v. *Shell Petroleum Corp.*, 147 Kan. 227, 75 P.2d 829 (1938), reannounced the rule. As a "typical" case in support of the rule, the court in *Bittle* cited *Farmer* v. *Purcell*, 109 Kan. 612, 201 Pac. 66 (1921). On page 616 of the *Farmer* case, however, the court said:

> "We are not called upon to determine whether the defendant might be liable notwithstanding the plaintiff was the employee of an independent contractor, under the portion of the compensation act which reads: [§ 44-503(a) was then quoted]."

Six years after the *Farmer* decision, the Kansas Supreme Court in *Purkable* v. *Greenland Oil Co.*, 122 Kan. 720, 253 Pac. 219 (1927), held that an employee of an independent contractor was within the coverage of § 44-503 when the work undertaken was necessarily incidental to the principal's trade or business.

The *Bittle* and *Purkable* decisions each spawned a separate line of cases. See *Truhlicka* v. *Beach Aircraft Corp.*, 162 Kan. 535, 178 P.2d 252 (1947) and *Waterbury* v. *Riss & Co.*, 169 Kan. 271, 219 P.2d 673 (1950) (following *Bittle*); and *Lehman* v. *Grace Oil Co.*, 151 Kan. 145, 98 P.2d 430 (1940) and *Bailey* v. *Mosby Hotel Co.*, 160 Kan. 258, 160 P.2d 701 (1945) (following *Purkable*).

A more recent Kansas pronouncement on the rule applicable to § 44-503 is found in *Lessley* v. *Kansas Power & Light Co., supra.* This case reiterates the *Purkable* rule. The *Bittle, Truhlicka,* and *Waterbury* cases were not overruled although four Justices, while concurring, felt that they should have been. *Lessley* must be accepted as the present rule in Kansas even though it does not eliminate all uncertainty.

Plaintiff also argues that if an employee of an independent contractor is not absolutely barred from coverage under § 44-503, the test for coverage is not only whether the work was necessarily incidental to the principal's trade or business as laid down in *Purkable,* but also whether the principal had the right to control the work.

The cases cited by plaintiff in support of the control test are not in point. *Bright* v. *Bragg,* 175 Kan. 404, 264 P.2d 494 (1953); *Evans* v. *Board of Educ.*, 178 Kan. 276, 284 P.2d 1068 (1955); *Judd* v. *City of Emporia,* 183 Kan. 689, 331 P.2d 316 (1958). The question in these cases was

whether there existed an employer-employee relationship which brought the plaintiff under the act in general. The provisions of § 44-503 were not relied upon.

The motion to dismiss must, therefore, be governed by what I believe to be the Kansas rule—that a principal is liable for injury to an employee of an independent contractor when the work in which he was engaged is part of the principal's business as a necessary incident to prosecution of the principal's primary business. Tested by this rule, I cannot say that the complaint shows on its face that no state of facts could be proved under its allegations which would entitle the plaintiff to relief. The motion to dismiss will be denied.

Counsel will submit an appropriate order.

Dated at Kansas City, this 28th day of February, 1962.

(signed) Arthur J. Stanley, Jr.
Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

HARRY L. COE,
Plaintiff,
vs.
HELMERICH & PAYNE, INC.,
Defendant.
No. KC-1511

Memorandum of Decision and Order

(Filed August 30, 1963)

This matter is now before the court on defendant's motion for summary judgment. On March 16, 1962, this court entered its order denying a motion to dismiss filed by the defendant. The facts and matters of law as more completely set out in the court's memorandum of decision filed March 1, 1962, are incorporated herein by reference.

The issue presented by the defendant's motion for summary judgment is whether an issue of material fact exists and whether the defendant is entitled to judgment as a matter of law.

These facts are established: Plaintiff's employer contracted with the defendant to clean an oil storage tank; they were customarily so employed; the plaintiff went upon property which was under the defendant's control to do the job assigned pursuant to the contract; and he was injured there in the performance of those duties.

In its earlier memorandum, this court held, *inter alia*, "* * * if a workman can recover compensation under the workman's compensation act for an injury the remedy is

exclusive and he cannot maintain a common law action for damages founded on negligence against a party from whom he could have recovered compensation under the act." *Lessley* v. *Kansas Power & Light Co.*, 171 Kan. 197, 231 P.2d 239 (1951). Further, it was held that an employee of an independent contractor is within the coverage of Kan. G.S. 1949, 44-503, whereby the principal is directly liable to the contractor's employee in workman's compensation, when the work undertaken is necessarily incidental to prosecution of the principal's trade or business. *Purkable* v. *Greenland Oil Co.*, 122 Kan. 720, 253 Pac. 219 (1927).

The critical question, therefore, is whether the work undertaken by the plaintiff was an integral part of the defendant's business. The plaintiff relies upon *Henderson* v. *Sutton's Food City*, 191 Kan. 145, 379 P.2d 300 (1963), where a trash hauler who had contracts with 20 or more business establishments in Topeka was held to be an "independent contractor." His employee, injured en route to one of the businesses for purposes of picking up trash, was held not to have been a "statutory employee" of the operator of such business, and therefore not entitled to workmen's compensation. In that case, the court said the test to determine the applicability of the statutory employee section is whether the work involved would ordinarily have been done through employees rather than independent contractors. (Citing *Durnil* v. *Grant*, 187 Kan. 327, 356 P.2d 872 (1960)). Affidavits filed by the plaintiff and the deposition of one of the defendant's employees establish that it was customary for the producing company to hire-out the tank cleaning work. David Dietz deposition, pp. 32, 33 (May 25, 1962).

The defendant urges that *Henderson* is distinguishable since the injury in that case did not occur on premises under the claimed principal's control. Subsection (d) of

44-503 states that the section shall not apply where the accident occurs elsewhere than on, in or about premises which are under the principal's control, or on or about premises on which the principal has undertaken to execute work. The purpose of such a clause is to limit the principal employer's liability to those situations where conditions may be assumed to be largely within his control or under his observation. 99 C.J.S. Workmen's Compensation § 107(d).

In his reply brief, the plaintiff asserts that the court in *Henderson* did not hinge its ultimate conclusion on the fact that the injury occurred elsewhere than on the respondent's premises. However, the court did observe, "(t)he claimant was not on the premises of Sutton when the accident occurred or even near the premises. He was many blocks away and had not been on the premises the day of the accident." *Henderson* v. *Sutton's Food City, supra,* at 149. This sufficiently distinguishes the *Henderson* case so that the rule announced there should not govern the disposal of the case at bar.

The defendant contends that the depositions, answers to interrogatories, and uncontroverted affidavits, filed after the denial of his motion to dismiss, disclose that the plaintiff's action is barred by the Kansas Workmen's Compensation Act. I agree. The depositions taken and interrogatories answered sufficiently show that the work in which the plaintiff was engaged was clearly a necessary incident to the defendant's trade.

The plaintiff's answer to the defendant's interrogatory number three was to the effect that the defendant, in properly conducting its business, had to have its storage tanks cleaned of sediment. It is also shown that the crude oil is not saleable until the sediment is removed. And an oil producer cannot continue operations without having the

sediment removed from its tanks periodically. David Dietz deposition, pp. 69, 70, 74 (May 25, 1962).

For the sake of judicial consistency, the workman's compensation provisions are to be construed liberally whether invoked by the workman or the statutory employer. *Bright* v. *Bragg*, 175 Kan. 404, 264 P.2d 494 (1953).

For the reasons hereinbefore stated, the defendant's motion for summary judgment is granted.

Dated at Kansas City, this 29th day of August, 1963.

(Signed) Arthur J. Stanley, Jr.
Chief Judge

APPENDIX C

Opinion

(Filed August 17, 1964)

Appeal from the United States District Court
for the District of Kansas

Before PHILLIPS, LEWIS and BREITENSTEIN, Circuit Judges.

LEWIS, Circuit Judge.

Appellant-plaintiff was injured in an explosion of an oil storage tank and sought recovery of resultant damages in a common law action of negligence filed in the District of Kansas, naming appellee as defendant. Holding that plaintiff's exclusive remedy was limited to that provided by the Kansas Workmen's Compensation Act, Kan. Gen. Stat., sections 44-501 et seq., the trial court granted defendant's motion for summary judgment. Upon appeal the pivotal question remains whether under all the undisputed facts and circumstances of plaintiff's employment he was a statutory employee of defendant under section 44-503[1] of the Kansas Act and consequently suf-

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1. This section reads:

"(a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of his trade or business or which he has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then in the application of this act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference

fered compensable injuries. If recovery under the Act is proper, such remedy is exclusive, Lessley v. Kansas Power & Light Co., 171 Kan. 197, 231 P.2d 239, and the judgment of the trial court is correct.

The facts are not in dispute. Defendant is engaged in the business of operating oil leases, developing oil and gas leases, drilling and pumping operations, and the storing of oil in tanks pending sale of the oil. The company had several such storage tanks near Garden City, Kansas, where it stored oil prior to delivery to a pipeline company. When oil is so stored, sediment gradually accumulates upon the tank floor, and when it reaches a depth of approximately eight inches the purchaser requires the tank to be cleaned as a condition to further acceptance of oil from the particular tank. Defendant (and others in the industry) did not use its own employees to clean its storage tanks but contracted the work out to various contractors familiar with and equipped to do the job.

During October, 1960, defendant's tank number 246 required cleaning and defendant engaged one Donald W. Edwards to perform the work. Edwards was a contractor authorized to do such work at rates approved by the Kansas Corporation Commission. On October 21, Edwards sent a crew of his employees to the site of tank 246, one of whom was plaintiff. When plaintiff attempted to remove the tank's access plate, a violent explosion occurred and plaintiff was severely injured. Both plaintiff's im-

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to the earnings of the workman under the employer by whom he is immediately employed. . . . (c) Nothing in this section shall be construed as preventing a workman from recovering compensation under this act from the contractor instead of the principal. (d) This section shall not apply to any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken to execute work or which are otherwise under his control or management, or on, in or about the execution of such work under his control or management."

mediate employer, Edwards, and the defendant were operating under the Kansas compensation act.

Whether under these circumstances plaintiff was a statutory employee of appellee within the mandate of section 44-503 of the Kansas compensation act should find determination in the case law of that state. However, our examination of the many cases decided by the Kansas Supreme Court which involve interpretation of the statutory section lends little comfort for we are unable to find a consistent and continuing emphasis upon those factors deemed decisive in particular cases. In Purkable v. Greenland Oil Co., 122 Kan. 720, 253 Pac. 219, an oil company had contracted for the erection of a derrick on leased oil land. During the construction of the derrick one of the contractor's workmen was fatally injured, and the workman's widow brought a claim for workmen's compensation against the oil company. The court held that, although the contractor was an independent contractor, since building the derrick was a part of the oil company's business, or necessarily incidental thereto, under section 44-503 the workman was a statutory employee of the oil company and covered by the workmen's compensation statutes. The reasoning in *Purkable* seems generally applicable to some later cases: See Wells v. Eagle-Picher M. & S. Co., 148 Kan. 794, 85 P.2d 22; Bailey v. Mosby Hotel Co., 160 Kan. 258, 160 P.2d 701; but inapplicable to others: See Bittle v. Shell Petroleum Corp., 147 Kan. 227, 75 P.2d 829; Truhlicka v. Beech Aircraft Corp., 162 Kan. 535, 178 P.2d 252; Waterbury v. Riss & Co., 169 Kan. 271, 219 P.2d 673.

In Lessley v. Kansas Power & Light Co., 171 Kan. 197, 231 P.2d 239, the Kansas Supreme Court recognized the contention that its decisions were not in complete harmony, but the court refused to "labor those decisions" and did not specifically overrule any of them. However, the

court held that an employee of an independent contractor who was injured in an explosion while constructing additional electrical production facilities upon the premises of the Kansas Power & Light Co. was a statutory employee of that utility. The court there stated:

> "A careful examination of the foregoing decisions makes it crystal clear that under the facts of the instant case, in determining the rights of the parties under the provisions of section 44-503 at the time appellant sustained his injuries, questions relating to whether (1) the original contract under which appellant was working was general in nature, (2) his immediate employer or the original contractor were independent contractors engaged in specialized work, (3) the appellee possessed adequate facilities to carry on the work covered by terms of the contract, (4) the extent of control retained over the work or workmen required for performance of its requirements or (5) other matters similar in character are of little consequence. In the final analysis the acid test to be applied is whether the work contracted to be done was a part of appellee's trade or business. If it were, and the rule announced in such decision is still the law, the parties were subject to the compensation act."

And see Durnil v. Grant, 187 Kan. 327, 356 P.2d 872.

But a still later case, Henderson v. Sutton's Food City, Inc., 191 Kan. 145, 379 P.2d 300, denies statutory employee compensation to a direct employee of an independent contractor injured while en route to the appellee's grocery store for the exclusive purpose of picking up the store's trash. The Kansas court here placed emphasis upon the fact that the injured person was not performing work ordinarily done by the appellee's direct employees and was injured off the premises.

In the case at bar it is admitted that the cleaning of the storage tanks was a necessary and continuing function of defendant's business but one not performed by defendant's direct employees. The injury occurred on defendant's premises. Since the proper application of these facts finds no completely convincing solution in the adjudicated Kansas cases, we accept the trial judge's interpretation upon a matter of purely local law. Bartch v. United States, 10 Cir., 330 P.2d 466, Cliborn v. Lincoln Nat'l Life Ins. Co., 10 Cir., ... F.2d ....., decided June 1964. Such judgment is in accord with numerous pronouncements of the Kansas Supreme Court and furthers that state's general policy of liberally construing the compensation act to allow coverage whether invoked by the workman or the statutory employer. Bright v. Bragg, 175 Kan. 404, 264 P.2d 494.

The judgment is affirmed.

APPENDIX D

No. 44,047

TROY HATAWAY, *Appellant,*

v.

PROCTOR & GAMBLE MANUFACTURING COMPANY, a Corporation,
Appellee.

Syllabus by the Court

In an appeal by an employee of a construction company the record is examined of a tort action for damages for personal injuries by reason of negligence of a soap manufacturer, from the trial court's order sustaining defendant's motion for summary judgment on the basis that plaintiff's sole remedy is under the Workmen's Compensation Act G. S. 1949, 44-505 (*a*) and (*d*), all as more fully shown in the opinion and it is *held;* that the trial court erred in sustaining defendant's motion for summary judgment.

Appeal from Wyandotte district court, division No. 4. WILLIAM H. McHALE, judge. Opinion filed August 17, 1965.

Reversed.

The following opinion was prepared by Mr. Justice Robb and approved by the court during his lifetime:

This appeal by the plaintiff in a tort action for damages for personal injuries by reason of negligence of the defendant was taken from the judgment and order of the trial court sustaining defendant's motion for summary judgment on the basis that plaintiff's sole remedy is under the workmen's compensation act.

Plaintiff's counsel admits that if plaintiff is a statutory employee as defined in G. S. 1949, 44-503 (*a*) and (*d*), now K. S. A. 44-503 (*a*) and (*d*), then plaintiff cannot bring this action for damages as an ordinary third party tortfeasor.

The facts are not in dispute or argued. Plaintiff was employed by Fruin-Colnon Contracting Company as a labor foreman in defendant's plant in Kansas City, Kansas, during construction of an extension and addition to its Tide Department. To expedite plaintiff's travel from one location to another on defendant's premises he was furnished with a bicycle by Fruin-Colnon. Defendant used a four-wheel fork lift on its premises which had a front end fork with a wooden pallet and on July 9, 1962, the day of the accident, a heavy two-wheel truck was being transported thereon. It was alleged that through the negligence of defendant's operator of the fork lift, the two-wheel truck was dislodged from the pallet and fell upon and against plaintiff while he was passing by on the bicycle, causing him to sustain severe injuries. His injuries are not presently in dispute and will not be detailed herein.

The trial court held that plaintiff was a statutory employee of defendant under the workmen's compensation act and sustained defendant's motion for summary judgment. Plaintiff appeals from that finding and order.

The sole question presented for appellate review is whether at the time of his injury plaintiff was an employee of defendant and would be subject to and limited by the following provisions of 44-503 (subcontracting):

> "(*a*) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of his trade or business or which he has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then in the application of this act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed. * * * (*d*) This section shall not apply to any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken to execute work or which are otherwise under his control or management, or on, in or about the execution of such work under his control or management."

Plaintiff in support of his contention he was not such a statutory employee, as above defined, cites *Durnil* v. *Grant*, 187 Kan. 327, 356 P. 2d 872; *Henderson* v. *Sutton's Food City*, 191 Kan. 145, 379 P. 2d 300.

Defendant relies on *Lessley* v. *Kansas Power & Light Co.*, 171 Kan. 197, 231 P. 2d 239.

A number of arguments and authorities are submitted by counsel but the most pertinent and controlling appear to be the three above-cited cases.

The statute in question which would make plaintiff a statutory employee has been heretofore set out.

In the Lessley case, determined by motion for judgment on pleadings ordered sustained, cited and relied on by defendant, it was stated:

> "In construing such statute we have held, so repeatedly that there can no longer be any question regarding the rule, that a principal is liable for injury sustained by workmen of an independent contractor when the accident arises out of and in the course of the principal's trade or business. Indeed we have said the very purpose of such section is to give the employees of such contractor a remedy against the principal and to give its provisions any other construction would simply mean an employer subject to the compensation act could escape liability for injuries received by persons in carrying on his trade or business by the simple expedient of hiring an independent contractor to do the work and letting him employ and direct the workmen. [Citations] It is, of course, elementary that the statute is equally applicable to employees of subcontractors. [Citation] Appellant recognizes this rule and admits that the principal cannot be held liable under the common law for the negligent injury of an employee of an independent contractor where the work being performed under the contract is part of the trade or business of the principal. However, in fairness, it should be here noted he insists the principal is not relieved from liability under the common law simply by reason of the fact the work of such a contractor may be required to equip the principal's trade or business for operation." (p. 204.)

It should be noted that in the admitted facts in the pleadings of the Lessley case, we find in regard to the Kansas Power and Light Company that,

> "It was authorized to do business as a public utility and . . . by virtue of the articles of incorporation issued it by the State of Kansas it was authorized . . . to do all things necessary for the conduct of a general electric . . . business, also to *build, construct* . . power plants, power houses. . . ." (Our emphasis.) (p. 199.)

In the Durnil case the claimant's immediate employer, Smith, delivered fruit and produce to retailers and restaurants. On March 31, 1958, claimant was injured and totally disabled while riding in Smith's delivery truck due to Smith's "blacking out" during deliveries to Smith's customers.

Respondent, Grant, was a wholesale fruit and vegetable distributor selling to retailers, sub-jobbers, other wholesalers and the general public and had his own salesmen who only solicited orders. Grant also had his own delivery trucks and drivers. Smith received orders for produce at his home or by a telephone to which he had access at Grant's place of business. Smith was also furnished a desk by Grant to write up orders and to transact business. Each morning Smith would go to Grant's with his truck, where he was furnished special dock space, and he and claimant would go into the warehouse and obtain fruit, etc., to fill the orders. The items were wrapped by Smith and claimant with Grant's paper and twine. No assistance or supervision were given by Grant's employees. House tickets were furnished Smith by Grant. The wrapping process was done alongside Grant's employees. Grant furnished Smith with the same price list his employees used and Smith did not pay Grant for the items when they were received by Smith.

Sometimes Smith would have to obtain items from other produce houses but their facilities were available to Smith. Employees even loaded the items into the truck at the other houses. When Smith could not make his deliveries, Grant's employees would make them.

In the Durnil case (p. 337) the trial court found that claimant was entitled to recover compensation under 44-503 (*a*), and in a well-reasoned opinion, this court affirmed that finding. The same statute was also involved in the Henderson case, where on appeal to this court claimant in a workmen's compensation case sought to reverse the trial court's judgment denying compensation.

The facts in the Henderson case were not in dispute. In 1949 George Irving orally contracted with Sutton to remove trash and rubbish from the latter's grocery store. Payment was by the month and Sutton, without notice, could terminate the agreement at any time. Sutton never exercised direct supervision or control over Irving's business operation. Irving was required to pick up trash as often as necessary which was normally every day. Irving was an independent businessman engaged in picking up trash from numerous businesses in Topeka. In 1959 Irving sold his trash route to William Miller who continued Irving's style of operation. Miller was never subject to direction, supervision or control by Sutton. Prior to July or August, 1961, Sutton had no knowledge of the sale by Irving to Miller. On May 27, 1961, Henderson, who had been helping Miller out "quite a bit" was engaged by Miller to pick up trash on Sunday morning, May 28, at Sutton's which was his only pick up on that day. En route to Sutton's Henderson "blacked out" and was injured in a single vehicle accident. Henderson's use of the Miller truck was unlimited, and he was free to do as he desired with it.

In another well-reasoned opinion in the Henderson case, we said:

> "Insofar as the record discloses hauling trash is not work which the manager of a grocery super market would ordinarily have done through employees of the business." (p. 148.)

For this, and many other reasons, it was held that Henderson's immediate employer was an independent contractor and the claimant was not a statutory employee of Sutton under 44-503(*a*).

In the Henderson case we found that the classification of a trash hauler was a separate and independent business operation.

Defendant's Ohio charter stated that it was formed for the purpose of,

> ". . . Manufacturing, refining or otherwise treating, buying, selling and dealing in soaps, candles, oils, greases, fats, glycerine and other kindred substances and products, including all by-products and other materials and products arising from or accompanying the manufacture or refining of any or all of such articles, and of acquiring, holding and disposing of all property, real, personal and mixed, necessary or convenient for carrying on said business in said State of Ohio, and also in any or all of the other states and territories and possessions of the United States and in foreign countries."

Definitions for trade or business:

1. Webster's New International Dictionary (2nd Edition)—of the 13 definitions, the seventh is most appropriate: (7) "Act or business of exchanging commodities by barter, or by buying and selling for money, commerce; traffic; as, international *trade*; adverse influences on *trade*; a slump in the cotton *trade*. *Trade*, in this sense, comprehends every spe-

cies of exchange or dealing, either in the produce of land, in manufactures, in bills, or in money; but it is chiefly used to denote the barter or purchase and sale of goods, wares, and merchandise, either by wholesale or retail."

2. Black's Law Dictionary:

"The act or business of exchanging commodities by barter; or the business of buying and selling for money; traffic; barter."

3. Kansas authority:

a. *Gray* v. *Sedgwick Co.*, 101 Kan. 195, 165 P 867 (1917). "Business" is synonymous with "calling," "occupation" or "trade" and means any particular occupation or employment engaged in for a livelihood or gain.

b. *Lehman* v. *Grace Oil Co.*, 151 Kan. 145, 154, 98 P. 2d 430 (1940). The court cited with approval *Horrell, et al* v. *Gulf & Valley Cotton Oil Co.*, 15 La. A. 603, 131 So. 709, 712 (1931).

". . . A manufacturing concern upon organization, may contract with an independent contractor for the erection of its factory building without retaining liability under the Compensation Act to employees of the independent contractor who undertakes the construction. It is no part of the trade, business, or occupation of the manufacturing concern to erect its factory building. Its business is to operate it after its erection."

b. *Massolini* v. *Driscoll*, 114 Conn. 546, 552, 159 At. 480 (1932).

" 'Trade' commonly connotes the buying, selling or exchanging of commodities. 'Business', however, is a much broader term. In *Easterbrook* v. *Hebrew Ladies Orphan Society*, 85 Conn. 289, 294, 82 Atl. 561, Justice Prentice stated: 'The word "business"

> is one which is used with widely variant meanings. It is used broadly to signify "that which . . . engages or [occupies] time, attention, or labor, as a principal serious concern or interest" ' ."
> c. *King* v. *Palmer*, 129 Conn. 636, 641, 30 A. 2nd 549 (1943).
>
> "If the work is of such a character that it ordinarily or appropriately would be performed by the principal employer's own employees in the prosecution of its business, or as an essential part in the maintenance thereof, it is a part or process of his work."

We are convinced that in view of what has been stated and discussed, that the Henderson case was controlling here. Insofar as the record discloses the construction of the Tide Building was not work which the manager of the Procter and Gamble soap company would ordinarily have done through employees of the business of manufacturing soaps and detergents. It was Fruin-Colnon Contracting Company's business to construct the building for the Tide addition on the Procter Gamble plant and it was the latter's business to operate the Tide addition after its erection.

The judgment is reversed with the directions to the trial court to overrule defendant's motion for summary judgment and proceed with the tort action for damages for personal injuries by reason of negligence of the defendant in accordance with the views expressed herein.

Parker, C.J. and Price, J. Dissenting.

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF KANSAS

TROY HATAWAY,
Appellant,
vs.
PROCTER & GAMBLE MANUFACTURING COMPANY, a corporation,
Appellee.

No. 44,047

Motion for Rehearing

After forty years of handling workmen's compensation cases, we now find an entirely new rule and conception in determining such cases, particularly when applied to corporations. Apparently, the philosophy *that Kansas holdings directly in point are to be regarded by the court* has been abandoned, and now holdings from foreign jurisdictions are to be favored. Also, resort to the dictionary appears to be a requirement to establish what constitutes trade and business or work incidental to or an integral part thereof; and that one rule is to be applied where the workman sues under the common law and another where he seeks workmen's compensation, arising out of the same accident. In other words, *stare decisis* has apparently lost its appeal.

The principal issue here involved was the question of whether the construction of an addition to one of appellee's soap company buildings came within what constitutes engaging in trade and business or was work incidental to or an integral part of the business.

Former decisions of this court had settled this question, holding that the construction of an addition to a company plant comes within the scope of the trade or

business of such company, but these holdings have been completely ignored by the writer of the present opinion in this case.

As the court presently holds, the employee of the contractor, while constructing an addition to the appellee's plant, is not to be considered a statutory employee of the appellee company; in other words, he *can* maintain a common law action against the appellee company, not withstanding that heretofore this court has held that only one such action can be brought and that under the Workmen's Compensation Act.

As stated in the cited *Lessley* case:

> "In this jurisdiction *it is well settled* that if a workman can recover compensation under the workmen's compensation act (G.S. 1935, Ch. 44, Art. 5) for an injury *the remedy is exclusive* and he cannot maintain a common law action for damages founded on negligence against a party from whom he could have recovered compensation under the act." (Emphasis supplied).

(*Crawford* v. *A. T. & S. F. Ry. Co.*, 166 Kan. 163, 165; *Duncan* v. *Perry Packing Co.*, 162 Kan. 79; *Hoffman* v. *Cudahy Pkg. Co.*, 161 Kan. 345; *Bailey* v. *Mosby Hotel Co.*, 160 Kan. 258; *Jennings* v. *Kans. Pow. & Light Co.*, 152 Kan. 469; *Echord* v. *Rush*, 124 Kan. 521; *Lessley* v. *Kans. Pow. & Light Co.*, 171 Kan. 203.)

Has this court thereby overruled the *Lessley* case? If so, this court should so state and not leave these matters in the air.

It is said in the *Lessley* case:

> "Under decisions to which we have just referred we have little difficulty in concluding, *in fact it is a common knowledge*, that steam boilers, turbines, generators *and other equipment, as well as a building in*

which to house them, are a part of the integral equipment necessary to the operation of a business of a public utility which is engaged in the production, transmission and sale of electricity." (P. 207) (Emphasis supplied).

In two earlier decisions, one cited in the very *Henderson* case that the court now states *is controlling of the case at bar,* is *Johnson* v. *Voss,* 152 Kan. 586. There the court held that although there were not sufficient employees to come under the Act, in passing on the similar issue involved here said:

> "*The construction of an addition* to respondent's grain elevator for the purpose of increasing its storage capacity *was incidental to respondent's grain elevator business....*"

citing *Raynes* v. *Riss & Co.,* 152 Kan. 383. There it was held:

> "*The remodeling of respondent's building was incidental to their truck line business.*"

Thus, it is seen instead of relying upon the *established law in this state, as set out in the Lessley case,* the writer of the opinion has resorted to a number of holdings from foreign jurisdictions, citing a Louisiana case (and leaving out a portion pertinent here), although in the cited *Henderson* case held controlling here, p. 10, the court said:

> "We do not view workmen's compensation cases from foreign jurisdictions as too persuasive."

In the *Lessley* case, evidence crept in showing that the charter of the power and light company contained a provision that it could construct new buildings or plants in the operation of its business; and here appellee, by way of explanation, noted the appellee's charter permitted

it to acquire property, either real, personal, and mixed. "Acquired" means, according to the dictionary, by one's own efforts; thus we said appellee's charter was broad enough in scope to permit the construction of an addition to its plant by its own efforts (or by contract). Certainly this should not be a pertinent issue in future workmen's compensation cases.

The real issue is whether the work in question was a reasonable incident of the employer's trade in business. However, if in future cases, charter provisions of a corporation are to be held pertinent, then if a corporation should be performing work incident to its business *not permitted by its charter,* this court would have to deny compensation to an injured employee performing work not covered by the charter. This presents a ridiculous situation. The court should not have considered this item, that is,

> ". . . courts do not regard *a single fact as conclusive* but will look to all the facts and circumstances." (*Durnil* v. *Grant,* 187 Kan. 327, p. 335).

This court, in two recent compensation cases, written since the opinion here, did not inquire concerning the charters or applicable provision of law, i.e., *Jones* v. *City of Dodge,* 194 Kan. 772 (where this court held that an addition or repair work to a stairway of a house, in which airport manager of the city lived, was work incident of the city's work, nor in a similar holding, *McCarty* v. *Great Bend Bd. of Ed. and Great Bend Recreation Comm.,* 195 Kan. 310 (where an independent plasterer was hired to do some plastering in the building owned or leased by the Commission). In the cited *Lessley* case it was said:

> "Indeed we have said the very purpose of such section (where principal contractor uses another person

> to do work that is part of the principal's trade or business) *is to give the employees of such contractor a remedy against the principal and to give its provisions any other construction would simply mean an employer subject to the compensation act could escape liability for injuries received by persons in carrying on his trade or business by the simple expedient of hiring an independent contractor to do the work* and letting him employ and direct the workmen." (p. 204) (between parenthesis, ours).

Assume the contractor engaged in constructing this addition to appellee's plant became insolvent and had this plaintiff, as one of the contractor's employees sought compensation under the Act (which he no doubt has already done) and if the construction company was insolvent, there is no doubt in our minds, but what this court under the liberal interpretation the court adheres to in compensation matters, would have allowed a recovery against the Proctor and Gamble Company.

The real basis of the holding in the *Henderson* case, which again the court states is controlling of this case, was that the accident did not occur on the premises of the Sutton Food Company but had occurred before Henderson had arrived at the food store, premises; that his boss had contracts with several different companies to haul trash at the same time; that he could have gone anywhere *before going to the Sutton premises,* thus he had never become a statutory employee of the Sutton Food City. (regardless of whether hauling trash was an integral part of the food company's business.) This, to our notion, is the first time the court has passed on whether hauling trash was an incident of a food store, but here the court on three occasions has spoken, saying an addition to a building is an integral part of the work being carried on the premises of the respondent.)

Again in the cited *Henderson* case, *Lehman* v. *Grace Oil Company* was cited, with the writer of this opinion quoting from that decision, a Louisiana case, although disregarding that in the *Lessley* case the court did not regard the contention made in Lehman *as sound authority* (p. 209).

So, here, we have a situation where the writer of the opinion completely disregards the settled law of this state and by inference brings in a new issue in workmen's compensation cases—that the charter of a corporation be examined to determine whether the work is an incident thereof and relies on foreign jurisdictions for authority to support the holding that the building work in question was not an integral part of appellee's business, when at the time the Kansas reports were replete with decisions interpreting, defining and describing what is meant by trade or business and what is incidental thereto, without reference to the dictionary, i.e., an addition to a plant is incidental to the business.

Here, Proctor and Gamble is a company that has been engaged in the manufacture of soap and its derivatives at this one location for more than sixty years to the knowledge of this writer. A photo attached at the rear of the appellee's brief filed herein discloses the immensity of this plant and shows numerous buildings, sheds, tanks and equipment which have been accumulated on this company's premises over the years, and shows the addition being made to the Tide Dept. commencing above the third floor of the existing Tide building. Naturally, the work of repairing, replacing, reconstructing and making these additions to this plant over all these years are surely incidents of its business, for without equipment, sheds, tanks and buildings, the company could not process their soap and derivatives. Without a covering over the equipment

the product of the company would not be protected from the sun, dust, rain and snow. All go hand in hand and form a part of the business.

We respectfully submit, as Cole Porter said in his familiar ballad, we are, "bewitched, bothered and bewildered" by the holdings in this opinion and believe in the interest of clarification and sound legal principals, a rehearing should be allowed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 729

HARRY L. COE,
Petitioner,

VS.

HELMERICH & PAYNE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

ARGUMENT

I.

There Is No Federal Question Involved and the Decision Based upon the Kansas Law Is Not One of General Interest, but Resolves Only the Question of the Petitioner's Right to Maintain a Common Law Action for Damages under the Undisputed Facts Disclosed by the Record Herein.

Petitioner does not contend that any question of federal law was raised or decided herein. The jurisdiction of

the federal district court was based on diversity of citizenship (Pet. 6) and the sole question presented to the trial court and to the United States Court of Appeals for the Tenth Circuit, was whether, under all the undisputed facts and circumstances of Petitioner's employment, he was a statutory employee of Respondent under the Kansas Workmen's Compensation Act, 3 Kansas Statutes Annotated 803, Section 44-503. Petitioner concedes that if he was such a statutory employee, his exclusive remedy was under the Kansas Workmen's Compensation Act and was thus barred from maintaining this common law action for damages for personal injuries against Respondent (Pet. 13).

II.

The Appellate Court Considered All Applicable Local Law Before Rendering Its Final Decision.

Petitioner states that the appellate court neglected to consider the effect of a change in local law occurring after the decision of the trial court and before the final decision of the appellate court (Pet. 10). This is not in accordance with the facts disclosed by the record and is not fair to the appellate court which, out of an overabundance of caution and at Petitioner's request, withheld its ruling on Petitioner's petition for rehearing for almost a year awaiting a decision of the Supreme Court of Kansas. It was not until after the Supreme Court of Kansas had ruled on the case pending before it and Petitioner's counsel had furnished the Court of Appeals for the Tenth Circuit with copies of that opinion, that the appellate court proceeded to rule upon the petition for rehearing pending before it (Pet. 9). Thus, the appellate court had examined and considered the opinion in *Hataway* v. *Procter & Gamble,* 195 Kan. ____, No. 44,047, opinion filed August 17, 1965, before the entry of its order denying the petition for rehearing. Subsequently, Petitioner's counsel filed a motion to convene the court

in banc pursuant to 28 U.S.C. § 46(c), and set out at length therein his views on the opinion in *Hataway*. The record shows that all active circuit judges of the circuit plus one senior circuit judge considered and denied this motion. Thus, both the three judge division and the court in banc considered the opinion Petitioner contends was a change in local law before the final decision of the appellate court in this case. Petitioner's allegation that the federal courts should have examined the opinion before pronouncing final judgment (Pet. 12) should properly under the facts admitted in the petition (Pet. 9) have stated that the appellate court, having examined the opinion of the Kansas Supreme Court, should have construed it the way Petitioner desires it construed rather than the way an impartial tribunal construed it. Respondent does not quarrel with the cases cited in support of Petitioner's Point I, but does state they do not involve the factual situation presented here.

III.

The Decision of the Kansas Supreme Court in Hataway v. Procter & Gamble Manufacturing Company Did Not Change the Kansas Law Applicable to This Case.

The pertinent provision of the Kansas law is Kansas Statutes Annotated 44-503, Subcontracting:

> "(a) Where any person (in this section referred to as principal) undertakes to execute any work *which is a part of his trade or business* or which he has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this act which he would have been liable to pay if that workman had been immediately employed by him; * * *." (Emphasis supplied).

A review of the opinion in *Hataway* (Pet. Appendix D), shows that the plaintiff there was employed by a construction company (Fruin-Colnon Contracting Company) during construction of an extension and addition to the plant of Procter & Gamble Manufacturing Company. The opinion states: "It was Fruin-Colnon Contracting Company's business to construct the building for the Tide addition on the Procter Gamble plant and it was the latter's business to operate the Tide addition after its erection." Thus, the decision in *Hataway* turned on the finding that the *construction* of the building was not part of the defendant's trade or business as required by K.S.A. 44-503(a).

That is not the factual situation presented in the instant case. Here, the Petitioner alleged that he was injured while engaged in cleaning a crude oil storage tank belonging to Respondent (R. 1, 2). Petitioner admitted by answers to interrogatories that Respondent was engaged in pumping oil from producing wells and storing the oil in tanks until it was delivered to a purchaser as part of its business and that it was necessary in the proper conduct of Respondent's business that the tanks be cleaned of sediment (R. 9, 10). The Kansas rule is that if the work being done is an integral part or a reasonable incident of the trade or business of one person and he undertakes to have it performed for him by another person, the workman employed by the person who contracts to do the work may look to the first person for compensation and in such event, the workman cannot maintain a common law action for damages against the first person.[1]

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1. *McCarty* v. *Great Bend Board of Education*, 195 Kan. 310, 403 P. 2d 956 (1965); *Whitaker* v. *Douglas*, 179 Kan. 64, 292 P. 2d 688 (1956); *Coble* v. *Williams*, 177 Kan. 743, 282 P. 2d 425 (1955); *Bright* v. *Bragg*, 175 Kan. 404, 264 P. 2d 494 (1953), and cases collected therein at p. 410.

In *Hataway* the court placed emphasis on the fact that the work being done was construction work preliminary to the operation of the plant by the defendant after its erection. Here, the Petitioner alleged that Respondent maintained and serviced batteries of crude oil storage tanks including the particular tank alleged to have caused injury to Petitioner (R. 1). As the opinion of the lower court noted regarding the instant case "it is admitted that the cleaning of the storage tanks was a necessary and continuing function of defendant's business * * *". The basic factual distinction was recognized in the *Hataway* opinion where the Kansas court cited with approval *Lehman* v. *Grace Oil Co.*, 151 Kan. 145, 154, 98 P. 2d 430 (1940), quoting the following from *Horrell et al.* v. *Gulf & Valley, etc., Inc.*, 15 La. App. 603, 103 So. 709 (1930):

> "'. . . A manufacturing concern upon organization, may contract with an independent contractor for the erection of its factory building without retaining liability under the Compensation Act to employees of the independent contractor who undertakes the construction. It is no part of the trade, business, or occupation of the manufacturing concern to erect its factory building. Its business is to operate it after its erection.'"

The next paragraph of the *Horrell* opinion quoted in *Lehman* v. *Grace Oil Co., supra,* at 154, is the part applicable to the instant case where admittedly the Respondent had in operation and was using at all times in its trade or business the crude oil storage tanks in question:

> "'On the other hand, it is clear that, after the factory is completed and is in operation, the principal may not employ an independent contractor to undertake any part of the business of operating the factory and thus escape liability in compensation to the employees actually engaged in carrying out the work undertaken by the independent contractor. For instance, if defendant here had employed Horrell to fur-

nish the necessary labor to operate the boilers, it is quite evident that Horrell's employees would, under the provisions of section 6 of the act, be entitled to look to defendant for compensation in the event of injury. We thus see that, if the original construction work is not a part of the business of the principal, that work may be contracted away, whereas the operation of the factory after construction is completed, being a part of the business of the principal, may not be so contracted away without the retention of compensation liability."

The distinction between *Hataway* and the instant case lies in the statutory limitation, K.S.A. 44-503(a), that the work undertaken must be part of the principal's trade or business. The Kansas Court held that the erection of the building was not a part of Procter & Gamble's trade or business, but this Petitioner has admitted that the work in which he was engaged at the time of his injury was part of Respondent's business (R. 9, 10).

Henderson v. *Sutton's Food City,* 191 Kan. 145, 379 P. 2d 300 (1963), cited by Petitioner, is distinguishable from the instant case in that the accident there occurred while Henderson was en route to Sutton's place of business and did not occur on, in or about premises on which Sutton had undertaken to execute work or which were otherwise under his control or management.

K.S.A. 44-503(d) states:

"(d) This section shall not apply to any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken to execute work or which are otherwise under his control or management, or on, in or about the execution of such work under his control or management."

K.S.A. 44-508(k) provides:

"(k) The words 'arising out of and in the course of employment' as used in this act shall not be con-

strued to include injuries to the employee occurring while he is on his way to assume the duties of his employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence."

In the instant case the Petitioner alleged that the injury occurred on premises where Respondent was conducting and maintaining oil pumping operations and that the crude oil storage tanks in question were "solely and exclusively within the possession and control of defendant" (R. 1, 3).

Although Petitioner states that *Hataway* has changed the Kansas law, a perusal of the opinion (Pet. Appendix D) shows that it does nothing more than decide the question presented by the factual situation of that particular case. No previous Kansas case is purported to be overruled or modified. The members of the Supreme Court of Kansas are not so inarticulate that they are unable to adequately express a change in basic rules of law by use of such a common term as "overruled". The decisions relied upon by Respondent and cited to the United States Court of Appeals for the Tenth Circuit remain the law of Kansas.[2]

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2. *Durnil* v. *Grant*, 187 Kan. 327, 356 P. 2d 872 (1960); *Whitaker* v. *Douglas*, 179 Kan. 64, 292 P. 2d 688 (1956); *Coble* v. *Williams*, 177 Kan. 743, 282 P. 2d 425 (1955); *Bright* v. *Bragg*, 175 Kan. 404, 264 P. 2d 494 (1953); *Primm* v. *Kansas Power & Light Co.*, 173 Kan. 443, 249 P. 2d 647 (1952); *Sheahan* v. *Kansas Power & Light Co.*, 172 Kan. 399, 241 P. 2d 515 (1952); *Lessley* v. *Kansas Power & Light Co.*, 171 Kan. 197, 231 P. 2d 239 (1951); *Swift* v. *Kelso Feed Co.*, 161 Kan. 383, 168 P. 2d 512 (1946); *Hoffman* v. *Cudahy Packing Co.*, 161 Kan. 345, 167 P. 2d 613 (1946); *Bailey* v. *Mosby Hotel Co.*, 160 Kan. 258, 160 P. 2d 701 (1945); *Schroeder* v. *American Nat'l Bank*, 154 Kan. 721, 121 P. 2d 186 (1942); *Johnson* v. *Voss*, 152 Kan. 586, 106 P. 2d 648 (1940); *Raynes* v. *Riss & Co.*, 152 Kan. 383, 103 P. 2d 818 (1940); *Wells* v. *Eagle-Picher M. & S. Co.*, 148 Kan. 794, 85 P. 2d 22 (1938); *Williams* v. *Cities Service Gas Co.*, 139 Kan. 166, 30 P. 2d 97 (1934); and *Purkable* v. *Greenland Oil Co.*, 122 Kan. 720, 253 Pac. 219 (1927).

CONCLUSION

Petitioner has not shown any special or important reason for granting a review on writ of certiorari. The legal principle involved extends no further than the facts of this particular case as reflected by the record. There is nothing presented to this Court which was not fully considered by the United States Court of Appeals for the Tenth Circuit before its final ruling. The issue involves nothing more than an interpretation of a particular section of the Kansas Workmen's Compensation Act in light of numerous decisions of the state court, and the decision of the Court of Appeals was in accordance with the applicable state law.

Respondent respectfully requests that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit be denied.

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